

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DAVID CASPER,)
Plaintiff,)
v.)
RENEE BAKER, *et al.*,)
Defendants.)
) 3:12-cv-00204-LRH-VPC
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REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE
) August 23, 2013
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This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is plaintiff's motion for summary judgment (#27)¹ and defendants' cross-motion for summary judgment (#35). Plaintiff opposed (#39) and defendants replied (#41). The court has thoroughly reviewed the record and recommends that plaintiff's motion for summary judgment (#27) be denied and defendants' cross-motion for summary judgment (#35) be granted in part and denied in part.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff David Casper (“plaintiff”), a *pro se* inmate, is currently incarcerated at Ely State Prison (“ESP”) in the custody of the Nevada Department of Corrections (“NDOC”) (#5, p. 1). On May 7, 2012, plaintiff filed a civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that defendants Renee Baker, E.K. McDaniel and Adam Watson violated his Eighth, Fourteenth and First Amendment rights (#5). The court screened the complaint pursuant to 28 U.S.C. § 1915A, and

¹ Refers to the court's docket numbers.

1 permitted the following claims to proceed: (1) Eighth Amendment claim for unconstitutional
2 conditions of confinement (count I); (2) Eighth Amendment claim for deliberate indifference to
3 medical needs (count I); (3) Fourteenth Amendment due process claim based upon no notice and no
4 hearing regarding plaintiff's placement in an isolation cell (count II); (4) Fourteenth Amendment due
5 process claim based upon deprivation of property (count II); and (5) First Amendment claim for
6 denial of the right to correspond (count III) (#6, pp. 10-11).

7 Plaintiff alleges that his constitutional deprivations began on October 28, 2010, when he was
8 transferred from a cell in ESP's disciplinary segregation unit to a "special isolation cell" in ESP's
9 infirmary (#5, p. 3).

10 Count I:

11 Plaintiff alleges that in his "special isolation cell," he only has a mattress, a blanket, a pair of
12 underwear, a t-shirt, socks, toilet paper and a bible (#5, p. 4). Plaintiff is not permitted to have a
13 towel, soap, toothbrush or toothpaste in his cell, and cannot wash his hands after he uses the toilet.
14 *Id.* at 5. Plaintiff states that he has asked defendants for cleaning supplies to clean his cell, but they
15 have denied his request. *Id.* Plaintiff claims that defendants are fully aware of the unconstitutional
16 conditions under which he is incarcerated, but have taken no action. *Id.*

17 Plaintiff also alleges that he has painful foot problems that have grown worse from walking
18 in his cell barefoot, as he is not permitted to have shoes in the isolation cell. *Id.* at 4. Plaintiff
19 complains of pain in his ankles, arches and the heels of his feet, and states that because of the pain,
20 he is unable to walk or exercise in his cell. *Id.* at 5. Plaintiff alleges that he has seen a prison doctor
21 on multiple occasions and the doctor acknowledged that he has a foot problem, but informed him
22 that "the order for you to not be allowed shoes is over my head." *Id.* Plaintiff avers that the only
23 thing the doctor could do for him was prescribe ibuprofen for the pain until prison officials again
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1 permitted plaintiff to wear shoes. *Id.* Plaintiff claims that defendants are fully aware of his medical
2 condition, but have exhibited deliberate indifference to his pain and his requests for shoes. *Id.*

3 *Count II:*

4 Plaintiff alleges that his incarceration in the “special isolation cell” poses an atypical and
5 significant hardship upon him (#5, p. 6). Plaintiff also alleges that defendants did not provide him
6 with any notice or a hearing as to why he was placed in such extreme living conditions and why all
7 of his property was withheld. *Id.* Plaintiff claims that he has requested his property multiple times,
8 but defendants have refused all of his requests. *Id.*

9 *Count III:*

10 Plaintiff alleges that he is allowed writing privileges for a couple of hours at a time, but that
11 his address book was withheld along with the rest of his property (#5, p. 7). Plaintiff states that
12 without his address book, he is unable to communicate with family and friends. *Id.*

13 Defendants allege that plaintiff has been housed at ESP for over a decade, but in recent years,
14 his prodigious skill at escape artistry has made him a unique security risk to the institution. On May
15 9, 2008, plaintiff escaped his cell into the plumbing chase, and made it to the roof before he was
16 apprehended (#35-1, Ex. A, pp. 5-6; #35-11, Ex. K, ¶ 4). In preparation for this escape attempt,
17 plaintiff manufactured various tools out of common prison items. *Id.* These tools included a
18 periscope, which was used to study correctional officer perimeter shift changes through the roof of
19 the building in which plaintiff was housed. *Id.* Plaintiff also manufactured a climbing rope, and
20 various wrenches and prying devices (#35-10, Ex. J, p. 4).

21 On October 28, 2010, correctional officers discovered that plaintiff had modified his light
22 fixture so that he could again escape into the plumbing chase outside of another ESP cell (#35-1, Ex.
23 A, p. 6; #35-2, Ex. B, p. 6). After plaintiff’s second escape attempt, defendant McDaniel realized
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1 that plaintiff could defeat the security measures in place in a standard ESP cell, despite the fact that
2 correctional officers had increased the frequency of their cell searches (#35-11, Ex. K, ¶ 7).
3 Accordingly, plaintiff was transferred to a cell in ESP's infirmary, where the cells are designed
4 differently than the cells from which plaintiff had previously escaped. *Id.* The infirmary cell was
5 also modified to prevent further escape attempts (#35-4, Ex. D, ¶ 5; #35-12, Ex. L, p. 11). For
6 example, the cell was painted with a bright orange enamel paint to prevent plaintiff from concealing
7 escape tools in the walls, and bars were placed on the windows. *Id.*

8
9 In December 2010, approximately two months after plaintiff was transferred to the infirmary
10 cell, an x-ray revealed that plaintiff had hidden a crescent wrench and other contraband up his anal
11 cavity (#35-11, Ex. K, ¶ 8).

12
13 In response to plaintiff's escape attempts, ESP officials have taken a number of precautions
14 when dealing with plaintiff. First, no staff member may contact plaintiff without a member of ESP's
15 Correctional Emergency Response Team ("CERT") present (#35-11, Ex. K, ¶ 10). Second, all of
16 plaintiff's personal property (including his personal hygiene items and address book) are kept
17 outside of his prison cell. *Id.* at ¶¶ 9, 11. However, plaintiff is allowed to use his personal hygiene
18 items and access his address book upon request (#35-4, Ex. D, ¶ 8; #35-11, Ex. K, ¶ 12). A member
19 of ESP's CERT delivers personal hygiene items and address book to plaintiff's cell, and then
20 collects the items when plaintiff has finished using them. *Id.* at ¶¶ 12-13. Plaintiff's cell is equipped
21 with a shower, and prison staff will activate the water flow so that plaintiff may bathe in his cell
22 upon request (#35-4, Ex. D, ¶ 9). Plaintiff is not permitted to keep cleaning supplies in his cell
23 because plaintiff has a demonstrated ability to use the abrasive qualities of cleaning agents, in
24 combination with string or dental floss, to slowly cut through the metal components of his cell. *Id.*
25 at ¶ 6. Third, from October 2010 through March 2012, plaintiff was not permitted to have shoes in
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1 his isolation cell (#35-11, Ex. K, ¶ 14; #35-4, Ex. D, ¶ 4). Given plaintiff's demonstrated
 2 resourcefulness at escape, shoes present plaintiff with an additional means to create escape tools or
 3 hide contraband (#35-11, Ex. K, ¶ 14). Further, given the terrain around Ely, Nevada, it would be
 4 far more difficult for plaintiff to escape ESP without shoes than with shoes (#35-11, Ex. K, ¶ 14;
 5 #35-4, Ex. D, ¶ 4). From October 2010 through March 2012, plaintiff was permitted to wear shoes
 6 whenever he left his cell, such as for exercise or any activity that required him to walk between
 7 buildings (#35-11, Ex. K, ¶ 14). By March 2012, because of a long period of good behavior,
 8 defendant Watson felt that plaintiff was no longer as serious of an escape risk and arranged for
 9 plaintiff to have a pair of shower shoes in his cell (#35-4, Ex. C, ¶ 4).

12 Since plaintiff has been housed in ESP's infirmary, he has sent several medical kites to
 13 prison officials complaining of his foot condition (#36, Ex. E). ESP medical staff have examined
 14 plaintiff many times, and plaintiff has received treatment for his ailments, including ibuprofen,
 15 ointment and bandages to treat the dry, bleeding skin on his feet. *Id.* at 1-6.

17 Defendants move for summary judgment on the grounds that: (1) defendants provided
 18 plaintiff with personal hygiene products and cleaning supplies upon request (#35, p. 8); (2)
 19 defendants were not deliberately indifferent to plaintiff's medical needs (#35, pp. 5-7); (3)
 20 defendants provided plaintiff with notice and a hearing concerning his housing status (#35, pp. 8-
 21 10); (4) defendants have consistently allowed plaintiff to access essential personal property (#35, p.
 22 10); (5) defendants provided plaintiff with due process for the deprivation of his non-essential
 23 personal property (#35, p. 11); (6) defendants have consistently allowed plaintiff to access his
 24 address book (#35, p. 12); and (7) defendants are entitled to qualified immunity for all of the security
 25 precautions taken to confine plaintiff. *Id.* at 12-14. Defendants attach several documents in support
 26 of their motion for summary judgment, including: (1) plaintiff's disciplinary history report (#35-1,
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1 Ex. A);² (2) plaintiff's disciplinary forms for Offense in Custody ("OIC") No. 316091 (#35-2, Ex.
 2 B);³ (3) the declaration of Adam Watson (#35-4, Ex. D); (4) plaintiff's medical records and medical
 3 kites (#36, Ex. E (*sealed*));⁴ (5) the declaration of Dr. Michael Koehn (#35-7, Ex. G); (6) the
 4 relevant version of NDOC's Administrative Regulation ("AR") 707 and Inmate Disciplinary Manual
 5 (#35-8, Ex. H);⁵ (7) photographs of some of the tools plaintiff created for his May 2008 escape (#35-
 6 10, Ex. J);⁶ (8) the declaration of E.K. McDaniel (#35-11, Ex. K); and (9) defendants' responses to
 7 interrogatories (set one) (#35-12, Ex. L).

9 Plaintiff moves for summary judgment, and opposes defendants' motion on the grounds that:
 10 (1) for the first two years in ESP's infirmary, plaintiff's access to personal hygiene items was very
 11 sporadic (#39, p. 5); (2) plaintiff was not afforded an opportunity to clean his cell until June 20, 2012
 12 (#27, p. 2); (3) plaintiff's painful foot problems would not have occurred if defendants had allowed
 13 him to have shoes in his cell (#39, p. 7); (4) although plaintiff received notice and a hearing for his
 14 October 28, 2010, disciplinary charges, he was not informed that he would be confined in ESP's
 15 infirmary in extreme isolation (#39, p. 9); (5) plaintiff's extreme property restrictions were not a part
 16 of his disciplinary hearing or a resulting sanction (#39, p. 9); and (6) plaintiff was not given access to
 17 his address book until June 20, 2012. *Id.* at 11, 112.

20 As a preliminary matter, the court notes that plaintiff is proceeding *pro se*. "In civil cases
 21 where the plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford
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25 ² Authenticated by the declaration of Harold M. Byrne (#35-3, Ex. C, ¶ 8).

26 ³ Authenticated by the declaration of Harold M. Byrne (#35-3, Ex. C, ¶ 9).

27 ⁴ Authenticated by the declaration of Scherrie Clinkscales (#35-6, Ex. F, ¶ 9).

28 ⁵ Authenticated by the declaration of Maxcine S. Blackwell (#35-9, Ex. I, ¶ 5). The court notes that defendants have also provided NDOC's AR 733, concerning disciplinary segregation (#35-8, pp. 50-52). However, the effective date of this document is June 17, 2012. Accordingly, this document was not in effect at the time plaintiff was transferred to ESP's infirmary isolation cell and does not inform the court's analysis.

⁶ Authenticated by the declaration of E.K. McDaniel (#35-11, Ex. K, ¶ 5).

1 plaintiff the benefit of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623
 2 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

3 II. DISCUSSION & ANALYSIS

4 A. Legal Standards

5 1. 42 U.S.C. § 1983

6 Title 42 U.S.C. § 1983 “provides a federal cause of action against any person who, acting
 7 under color of state law, deprives another of his federal rights.” *Conn v. Gabbert*, 526 U.S. 286, 290
 8 (1999). Section 1983 does not offer any substantive rights, but provides procedural protections for
 9 federal rights granted elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To prove liability
 10 under § 1983, a plaintiff must: (1) show that a person acting under color of state law engaged in
 11 some type of conduct, which (2) deprived the plaintiff of some right, privilege or immunity secured
 12 by the Constitution or federal statutory law. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overturned*
 13 *on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

14 2. Summary Judgment Standard

15 Summary judgment allows courts to avoid unnecessary trials where there are no factual
 16 disputes. *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The
 17 court will grant summary judgment if no genuine issues of material fact remain in dispute and the
 18 moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court must view all
 19 evidence and any inferences arising from the evidence in the light most favorable to the nonmoving
 20 party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). However, the Supreme Court has
 21 noted:

22 [W]e must distinguish between evidence of disputed facts and disputed matters of
 23 professional judgment. In respect to the latter, our inferences must accord deference
 24 to the views of prison authorities. Unless a prisoner can point to sufficient evidence

1 regarding such issues of judgment to allow him to prevail on the merits, he cannot
 2 prevail at the summary judgment stage.

3 *Beard v. Banks*, 548 U.S. 521, 530 (2006) (internal citations omitted). Where reasonable minds
 4 could differ on the material facts at issue, however, summary judgment should not be granted.

5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

6 The moving party bears the burden of informing the court of the basis for its motion, and
 7 submitting authenticated evidence to demonstrate the absence of any genuine issue of material fact
 8 for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see Orr v. Bank of America*, 285 F.3d
 9 764, 773-74 (9th Cir. 2002). Once the moving party has met its burden, the party opposing the
 10 motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific
 11 facts showing the existence of a genuine issue for trial. *Anderson*, 477 U.S. at 248. Rule 56(c)
 12 mandates the entry of summary judgment, after adequate time for discovery, against a party who
 13 fails to make a showing sufficient to establish the existence of an element essential to that party's
 14 case, and upon which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23.

17 On summary judgment the court is not to weigh the evidence or determine the truth of the
 18 matters asserted, but must only determine whether there is a genuine issue of material fact that must
 19 be resolved by trial. *See Summers v. A. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).
 20 Nonetheless, in order for any factual dispute to be genuine, there must be enough doubt for a
 21 reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment
 22 motion. *See Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

25 **B. Analysis**

26 **1. Eighth Amendment Conditions of Confinement**

27 "It is undisputed that the treatment a prisoner receives in prison and the conditions under
 28 which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment." *Helling v.*

¹ *McKinney*, 509 U.S. 25, 31 (1993); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

² Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with

³ food, clothing, shelter, sanitation, medical care and personal safety. *Id.*; *Hoptowit v. Ray*, 682 F.2d

⁴ 1237, 1246 (9th Cir. 1982) (citation omitted). The court must analyze each condition separately to

⁵ determine whether a specific condition violates the Eighth Amendment. *See Hoptowit*, 682 F.2d at

⁶ 1246-47. “Some conditions of confinement may establish an Eighth Amendment violation ‘in

⁷ combination’ when each would not do so alone, but only when they have a mutually enforcing effect

⁸ that produces the deprivation of a single, identifiable human need such as food, warmth, or

⁹ exercise—for example, a low cell temperature at night combined with a failure to issue blankets.”

¹⁰ *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). When considering the conditions of confinement, the

¹¹ court should consider the amount of time to which the prisoner was subjected to the condition. *See*

¹² *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978); *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir.

¹³ 2005); *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003).

¹⁴ Plaintiff alleges that he has been housed in unconstitutional conditions since October 28,

¹⁵ 2010 (#5, p. 4). Specifically, plaintiff alleges that he only has a mattress, a blanket, a pair of

¹⁶ underwear, a t-shirt, socks, toilet paper and a Bible, and that he was not permitted to have a towel,

¹⁷ soap, toothbrush or toothpaste in his cell. *Id.* Plaintiff also alleges that defendants denied his

¹⁸ requests for cleaning supplies. *Id.*

¹⁹ After plaintiff’s second nearly successful escape attempt in October 2010, prison officials

²⁰ logically determined that he could no longer be housed in a standard ESP cell (#35-11, Ex. K, ¶ 9).

²¹ Prison officials also concluded that much of plaintiff’s personal property should be kept outside his

²² prison cell.⁷ *Id.* Plaintiff has been permitted to use essential personal hygiene items—such as a

²³ ⁷ The court notes that despite these precautions, plaintiff was caught with a crescent wrench and other contraband up his

1 towel, soap, toothbrush and toothpaste (#35-11, Ex. K, ¶ 13; #35-4, Ex. D, ¶ 8). Plaintiff's cell is
2 also equipped with a shower, and prison staff will turn on the water so that plaintiff may bathe in his
3 cell upon request (#35-4, Ex. D, ¶ 9). Although plaintiff asserts that the frequency with which he
4 was initially provided personal hygiene products was inadequate, plaintiff has failed to submit any
5 evidence showing the court how often he requested his personal hygiene products versus how often
6 he was given an opportunity to use them.

8 Prison officials properly determined that plaintiff should not be permitted to keep cleaning
9 supplies in his cell due to security concerns that plaintiff would use the abrasive qualities of the
10 cleaning agents, in combination with string or dental floss, to slowly cut through the metal
11 components of his cell (#35-4, Ex. D, ¶ 6). It is undisputed that plaintiff was permitted to clean his
12 cell on June 20, 2012 (#27, p. 91). Defendants have submitted evidence that plaintiff requested
13 cleaning supplies, CERT provided plaintiff with cleaning supplies, and then CERT removed the
14 supplies once plaintiff had finished cleaning his cell (#35-12, Ex. L, p. 9). Plaintiff submitted an
15 informal grievance, dated March 23, 2012, in which he complained that his cell had not been cleaned
16 for one and a half years, and that he had requested cleaning supplies multiple times (#27, p. 88).
17 However, plaintiff has failed to provide the court with any prior grievances showing that he had, in
18 fact, requested cleaning supplies prior to March 2012.

21 Although the court agrees that plaintiff's confinement in ESP's infirmary is more restrictive
22 than his previous confinement in ESP's administrative segregation unit, there is nothing in the record
23 to indicate that the conditions of plaintiff's confinement are so intolerable as to constitute an Eighth
24 Amendment violation. Defendants have not denied plaintiff food, shelter, clothing, basic sanitation,
25 medical care or personal safety. *See Farmer*, 511 U.S. at 832. There is also nothing in the record to
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anal cavity in December 2010 (#35-11, Ex. K, ¶ 8).

1 suggest that with continued good behavior, plaintiff cannot regain some of his lost privileges.⁸
 2 Accordingly, the court recommends that defendants' cross-motion for summary judgment be granted
 3 as to plaintiff's Eighth Amendment conditions of confinement claim.
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5 **2. Eighth Amendment Deliberate Indifference to a Serious Medical Need**

6 A prisoner's claim of inadequate medical care arises under the Eighth Amendment. *See*
 7 *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The Eighth Amendment prohibits the imposition of
 8 cruel and unusual punishment and "embodies broad and idealistic concepts of dignity, civilized
 9 standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). To prevail in an
 10 action alleging cruel and unusual punishment, a plaintiff's case must satisfy an objective standard—
 11 that the deprivation was serious enough to amount to cruel and unusual punishment; and a subjective
 12 standard—deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Wilson v.*
 13 *Seiter*, 501 U.S. 294, 297-304 (1991). A prison official violates the Eighth Amendment when he
 14 responds with deliberate indifference to an inmate's serious medical needs. *Farmer*, 511 U.S. at
 15 834.
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17 The objective requirement of a "serious medical need" is met if the failure to treat a
 18 prisoner's condition could result in further significant injury or the "unnecessary and wanton
 19 infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle*, 429 U.S. at
 20 104). In this circuit, examples of serious medical needs include "the existence of an injury that a
 21 reasonable doctor or patient would find important and worthy of comment or treatment; the presence
 22 of a medical condition that significantly affects an individual's daily activities; or the existence of
 23 chronic and substantial pain." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (citations
 24 omitted).
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 28 ⁸ The court notes that plaintiff has regained the privilege of wearing shower shoes inside his cell (#35-4, Ex. C, ¶ 4).

1 The subjective standard of deliberate indifference requires “more than ordinary lack of due
2 care for the prisoner’s interests or safety.” *Farmer*, 511 U.S. at 835 (quoting *Whitley*, 475 U.S. at
3 319). The requisite state of mind lies “somewhere between the poles of negligence at one end and
4 purpose or knowledge at the other.” *Id.* at 836. To prove deliberate indifference, a plaintiff must
5 demonstrate that prison staff denied, delayed, or intentionally interfered with medical treatment, or
6 that the manner in which prison staff provided medical care indicated deliberate indifference; and
7 that plaintiff sustained damages as a result of such conduct. *Hutchinson v. United States*, 838 F.2d
8 390, 394 (9th Cir. 1988).

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10 The State’s responsibility to provide inmates with medical care ordinarily does not conflict
11 with competing administrative concerns. *Hudson v. McMillan*, 503 U.S. 1, 7 (1992) (citation
12 omitted). However, in some cases it may be important to balance the “competing tensions” between
13 the “prisoners’ need for medical attention and the government’s need to maintain order and
14 discipline,” in determining the prison officials’ subjective intent. *Clement v. Gomez*, 298 F.3d 898,
15 905 n.4 (9th Cir. 2002).

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17 Plaintiff alleges that defendants have exhibited deliberate indifference to his painful, bleeding
18 foot problems, in violation of the Eighth Amendment (#5, p. 5). Plaintiff claims that his painful foot
19 problems have grown worse from walking barefoot in his concrete cell, as defendants will not permit
20 him to have shoes in his cell. *Id.* at 4. Plaintiff also claims that a prison doctor agreed that plaintiff’s
21 painful foot problems would be alleviated if plaintiff could simply wear shoes, but has informed him
22 that “the order for you to not be allowed shoes is over my head.” *Id.* at 5.

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24 The court finds that defendants did not exhibit deliberate indifference to plaintiff’s serious
25 medical needs. First, there is no evidence that plaintiff’s foot problems constituted a serious medical
26 need. Plaintiff’s medical progress notes indicate that plaintiff had “cracked, dry feet” which “bleed,”
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1 however, the progress notes do not indicate that plaintiff's foot condition was a serious medical
2 concern (#36, Ex. E, pp. 2-6 (*sealed*)).

3 Second, even assuming *arguendo* that plaintiff's cracked, dry feet constituted a serious
4 medical need, there is no indication that defendants Baker, McDaniel and Watson or any ESP
5 medical provider denied, delayed, or otherwise disregarded plaintiff's medical condition, or chose a
6 medically unacceptable course of treatment "in conscious disregard of an excessive risk" to
7 plaintiff's health. *See Hutchinson*, 838 F.2d at 394; *Jackson*, 90 F.3d at 332. Instead, ESP medical
8 staff examined plaintiff's feet multiple times, and offered him ointment, bandages, ibuprofen and
9 patient education (#36, Ex. E, pp. 2-6 (*sealed*))). Although plaintiff alleges that his painful, bleeding
10 foot problems would be cured if defendants simply permitted him to wear shoes inside his cell,
11 "[u]ncorroborated and self-serving testimony" without more, will not create a genuine issue of
12 material fact precluding summary judgment. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,
13 1061 (9th Cir. 2002). Further, plaintiff's allegations are belied by the record. *See* Dr. Michael
14 Koehn's declaration, #35-7, Ex. G, ¶ 6 ("[N]one of Mr. Casper's alleged medical problems are
15 caused by a lack of shoes or other footwear, none of his alleged medical problems require or have
16 required footwear as a treatment . . .").

20 Finally, the court notes that this case presents the type of circumstance contemplated in
21 *Clement*. Plaintiff has managed to escape two cells in Nevada's only maximum security facility
22 (#35-1, Ex. A, pp. 5-6; #35-2, Ex. B, p. 6; #35-11, Ex. K, ¶¶ 4, 7). He has manufactured escape
23 tools from ordinary prison items, and he has successfully concealed these tools from prison
24 authorities (#35-11, Ex. K. ¶¶ 4, 7-8). Thus, in determining defendants' subjective intent, it is
25 important to balance plaintiff's need for constitutionally adequate medical care with ESP's need to
26 maintain order and prevent prisoner escape. *See Clement*, 298 F.3d at 905 n.4. The evidence
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suggests that shoes may present plaintiff with an additional opportunity to create escape tools or conceal contraband. *Id.* at ¶ 14. Given the terrain around Ely, Nevada, it would also be far more difficult for plaintiff to escape ESP without shoes than with shoes. *Id.* Considering plaintiff's demonstrated proclivity for escape, the court finds that defendants reasonably denied plaintiff's requests to have shoes in his cell.

Plaintiff's claim that defendants Baker, McDaniel and Watson exercised deliberate indifference to his serious medical needs is contrary to the evidence before the court. Plaintiff has failed to demonstrate the existence of any genuine issue of material fact, and he has failed to produce any evidence to suggest that defendants acted in conscious disregard of a significant risk to plaintiff's health. Accordingly, the court recommends that defendants' cross-motion for summary judgment be granted as to plaintiff's Eighth Amendment deliberate indifference claim.

3. Fourteenth Amendment Due Process

The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary government action by prohibiting states from depriving people of "life, liberty, or property without due process of law." U.S. Const. amend. XIV. A valid due process claim has three prerequisites: (1) the deprivation, (2) of a liberty or property interest, (3) by officials acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981). To prevail on a claim of deprivation of liberty or property without due process of law, a plaintiff must first establish the existence of a protected liberty or property interest. After meeting this threshold requirement, the plaintiff must then demonstrate that the defendants failed to provide the process due. *See Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974); *Serrano v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003).

1 *Plaintiff's Confinement in ESP's Infirmary:*

2 Liberty interests may arise from two sources—the Due Process Clause itself or state law.

3 *Hewitt v. Helms*, 459 U.S. 460, 466-68 (1983), *abrogated in part on other grounds by Sandin v.*

4 *Conner*, 515 U.S. 472 (1995). The Due Process Clause itself does not confer a liberty interest in

5 freedom from state action taken “within the normal limits or range of custody which the conviction

6 has authorized the State to impose.” *Sandin*, 515 U.S. at 478 (citing *Meachum v. Fano*, 427 U.S.

7 215, 225 (1976)). Thus, the Supreme Court has found that the Due Process Clause does not afford

8 prisoners a liberty interest in being free from intrastate prison transfers, *Meachum*, 427 U.S. at 225,

9 or in remaining in the general prison population. *Hewitt*, 459 U.S. at 468; *May v. Baldwin*, 109 F.3d

10 557, 565 (9th Cir. 1997) (“administrative segregation falls within the terms of confinement

11 ordinarily contemplated by a sentence.”) However, in certain circumstances, states may create

12 liberty interests protected by the Due Process Clause. *Sandin*, 515 U.S. at 483-84. For example, in

13 *Sandin*, the Court found that a liberty interest in avoiding transfer to particular conditions of

14 confinement may arise from state prison regulations if the transfer “imposes [an] atypical and

15 significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*, 515

16 U.S. at 484; *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005).

20 Once a protected liberty interest has been found, the court need only decide what process is

21 due, which is a question of law, and then decide whether defendants have provided the process due.

22 *Quick v. Jones*, 754 F.2d 1521, 1523 (1984). When an inmate faces disciplinary charges, prison

23 officials must provide the inmate with: (1) a written statement at least twenty-four hours before the

24 disciplinary hearing that includes the charges and a description of the evidence against the prisoner;

25 (2) an opportunity to present documentary evidence and call witnesses, unless calling witnesses

26 would be unduly harmful to institutional security or correctional goals; (3) legal assistance where the

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1 charges are complex or the inmate is illiterate; and (4) a written statement by the factfinders detailing
2 the evidence relied upon and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563-70. In
3 addition, the findings of the prison disciplinary board must be supported by some evidence in the
4 record. *Superintendent v. Hill*, 472 U.S. 445, 454 (1985). This standard is met if “there was some
5 evidence from which the conclusion of the administrative tribunal could be deduced . . .” *Id.* at 455
6 (citing *U.S. ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927)).

7 Plaintiff alleges that his incarceration in ESP’s “special isolation cell” poses an atypical and
8 significant hardship upon him, and that defendants never provided him with any notice or a hearing
9 as to why he was confined in such extreme living conditions (#5, p. 6; #39, p. 9). In plaintiff’s
10 complaint, he simply states that he was transferred from the disciplinary segregation unit to ESP’s
11 infirmary (#5, p. 3). Thus, plaintiff phrases his housing complaints as administrative in nature.
12 However, in reality, plaintiff is housed in ESP’s infirmary as both an administrative attempt to
13 prevent his escape and pursuant to his disciplinary segregation.

14 On October 28, 2010, ESP correctional officers discovered that plaintiff had modified his
15 light fixture so that he could again gain access to the plumbing chase outside of his cell (#35-1, Ex.
16 A, p. 6; #35-2, Ex. B, p. 6). At that point, plaintiff was transferred to ESP’s infirmary, which is the
17 only area of the prison where the cells are designed differently than the cells from which plaintiff
18 had previously escaped (#35-11, Ex. K, ¶ 7). On November 3, 2010, plaintiff received a copy of the
19 notice of charges and attended a preliminary hearing (#35-2, Ex. B, p. 6). At the hearing, plaintiff
20 pled not guilty to: (1) MJ47: Escape, (2) MJ26: Possession of contraband, (3) MJ23: Property
21 damage greater than \$50; (4) G15: Presence in an unauthorized area, and (5) MJ22: Tampering with
22 a locking device. *Id.* at 8. On November 24, 2010, plaintiff attended a disciplinary hearing where he
23 elected to remain silent and did not request a witness. *Id.* at 5. The disciplinary hearing officer
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1 found plaintiff guilty of all charges based on the evidence recovered from the scene, photographs of
2 plaintiff's cell, and officer reports of statements plaintiff allegedly made at the time of the incident.
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4 *Id.* at 3. The hearing officer sanctioned plaintiff to five years and ninety days in disciplinary
5 segregation and restitution. *Id.* at 4.

6 The court finds that plaintiff's confinement in ESP's "special isolation cell" implicates a
7 protected liberty interest. However, defendants did not violate plaintiff's procedural due process
8 rights. Plaintiff claims that defendants should have provided him with notice and a hearing as to
9 their reasons for housing him in ESP's infirmary. However, the record indicates that plaintiff was
10 well aware of the charges against him and had a meaningful opportunity to contest those charges
11 through his disciplinary proceedings. Due process does not require prison administrators to provide
12 inmate's with notice that they will be housed in any particular cell or a hearing to contest their
13 confinement in any particular cell. Further, plaintiff cannot legitimately claim that he did not know
14 why prison administrators decided to confine him in ESP's infirmary, since plaintiff apparently had
15 the potential ability to escape from every other cell in the institution.
16

17 The court finds that defendants housed plaintiff in ESP's infirmary due, in part, to
18 disciplinary sanctions he received as a result of his October 28, 2010, escape attempt. The court also
19 finds that defendants provided plaintiff with due process through his disciplinary proceedings.
20 Plaintiff received a written notice of charges well in advance of his disciplinary hearing which
21 included a detailed description of the evidence against him; an opportunity to present evidence and
22 call witnesses; and a written statement detailing the evidence the hearing officer relied upon and the
23 reasons for the disciplinary action (#35-2, Ex. B). Plaintiff was not entitled to specific notice that he
24 would serve his five-year and ninety-day disciplinary segregation in ESP's infirmary or to a hearing
25 on this issue. Accordingly, the court recommends that defendants' cross-motion for summary
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1 judgment be granted as to plaintiff's Fourteenth Amendment due process claim regarding
 2 confinement in ESP's infirmary.

3 *Plaintiff's Property:*

4 To prevail on a claim of deprivation of property without due process of law, a plaintiff must
 5 first establish the existence of a constitutionally protected interest in the property. *See Ingraham v.*
 6 *Wright*, 430 U.S. 651, 672-73 (1997). After meeting this threshold requirement, the plaintiff must
 7 then demonstrate that defendants failed to provide the process due. *Wolff*, 418 U.S. 556-57.

8 Prisoners retain certain property interests despite being incarcerated. For example, courts
 9 have held that inmates have constitutionally protected property interests in hobby kits ordered while
 10 in prison, *Parrat v. Taylor*, 451 U.S. 527, 536 (1981); funds in their inmate accounts, *Quick v. Jones*,
 11 754 F.2d 1521, 1523 (9th Cir. 1984); and books, *Caldwell v. Miller*, 790 F.2d 589, 608 (7th Cir.
 12 1986). Prisoners also have a protected property interest in their personal property. *See Hansen v.*
 13 *May*, 502 F.2d 728, 730 (9th Cir. 1974).

14 Even when an inmate has a protected property interest in a particular item, it does not
 15 necessarily mean that the inmate may possess that item while incarcerated. Authorized property
 16 deprivations are permissible if conducted pursuant to a regulation that is reasonably related to a
 17 legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). An authorized deprivation
 18 occurs pursuant to "state law, regulation, or institutionalized practice," and the normal pre-
 19 deprivation hearing is required to satisfy due process. *Haygood v. Younger*, 769 F.2d 1350,1357
 20 (9th Cir.1985) (en banc), *cert. denied*, 478 U.S. 1020 (1986) (citing *Logan v. Zimmerman Brush Co.*,
 21 455 U.S. 422, 436 (1982)).

22 Plaintiff alleges that upon his transfer to ESP's infirmary, defendants confiscated all of his
 23 property, and never provided him with any notice or a hearing as to why his property was withheld

#5, p. 6). Plaintiff asserts that defendants never provided him with any due process for this atypical situation, and that his disciplinary proceedings did not involve any property sanctions. *Id.* Further, plaintiff claims that he has repeatedly asked defendants to return his property, including legal papers, photos, letters and books, but they have refused his requests. *Id.*

Defendants make several arguments with regard to plaintiff's property claim. First, defendants claim that plaintiff has not been "deprived" of his property because the property is stored outside his cell and made available for his use (#35, p. 10). Second, they contend that plaintiff's disciplinary proceedings "afforded him all of the process due him to enable prison authorities to make the determination to store the property outside his cell." *Id.* Third, defendants admit that plaintiff has been deprived of some of his property, such as electronic appliances, but claim that he was deprived of these property items pursuant to his placement in disciplinary segregation. *Id.* at 11.⁹

The court finds that it does not have adequate information to determine whether plaintiff's Fourteenth Amendment due process rights were violated. Although defendants have clearly conducted an authorized, intentional deprivation of plaintiff's personal property, they have not provided the court with any particular "state law, regulation, or institutionalized practice," under which their actions were permissible. *See Haygood*, 769 F.2d at 1357. They have also failed to submit any evidence which would allow the court to decide whether confiscating every single item

⁹ Defendants also argue that they are entitled to summary judgment because plaintiff neglected to pursue appropriate state post-deprivation remedies (#35, p. 11). Defendants contend that because Nevada provides a post-deprivation remedy, the deprivation of plaintiff's property was not a constitutional violation. *Id.* Defendants completely misunderstand the law on this point. It is clear that plaintiff alleged an authorized, intentional deprivation of property—which is actionable under the Due Process Clause (#6, p. 7). *See Hudson v. Palmer*, 468 U.S. 517, 532 n. 13 (1984). Plaintiff did not allege a negligent or unauthorized, intentional deprivation of property. If he had, then Nevada's post-deprivation remedies may be relevant to this analysis. *See Parratt v. Taylor*, 451 U.S. 527, 537-38 (1981), overruled on other grounds by *Daniel v. Williams*, 474 U.S. 327 (1986); *Hudson*, 468 U.S. at 533. Here, they are not.

1 of plaintiff's personal property (except for a Bible) was reasonably related to legitimate penological
2 interests.

3 The court agrees that limiting certain property items (such as items that could be fashioned
4 into escape tools or items that could conceal contraband) is reasonably related to the prison's interest
5 in preventing escape. However, defendants have made no showing that limiting *all* property items
6 reasonably advances prison interests. Further, defendants' non-specific claim that plaintiff has not
7 been "deprived" of his property because the property is stored outside his cell and made available for
8 his use, is simply not supported by the record. It appears that some property items are kept outside
9 of plaintiff's cell and given to him upon request (#35-12, Ex. L, p. 5). However, it appears that a
10 great many other property items are secured in ESP's property room or the CERT office. *Id.*

13 Finally, the court notes that unlike plaintiff's Fourteenth Amendment due process claim
14 regarding his confinement in ESP's infirmary, plaintiff did not receive any due process regarding the
15 confiscation of his property. Plaintiff was transferred to ESP's infirmary, in part, due to disciplinary
16 sanctions from his October 28, 2010, escape attempt—for which plaintiff received a disciplinary
17 hearing. However, there is no record that plaintiff's disciplinary sanctions included any sort of full-
18 scale property confiscation. The court notes that at the time of plaintiff's October 28, 2010, escape
19 attempt, he was already housed in the disciplinary segregation unit as a High Risk Potential ("HRP")
20 inmate. Thus, the court presumes that the property plaintiff possessed at that time fell within the
21 restrictions inherent in disciplinary segregation. Defendants have not submitted any evidence
22 suggesting that any additional property should have been withheld as a sole consequence of
23 plaintiff's November 24, 2010, disciplinary sanctions.

26 The court finds that the record is deficient as to NDOC's regulations governing property
27 confiscation, Ely's penological interests in confiscating *all* of plaintiff's personal property, and any
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sort of procedural due process that plaintiff may or may not have been afforded. Instead, the record is rife with genuine issues of material fact precluding summary judgment on either side. Accordingly, the court recommends that defendants' cross-motion for summary judgment be denied as to plaintiff's Fourteenth Amendment due process claim regarding the confiscation of his personal property.

4. First Amendment Right to Correspond

Prisoners enjoy a First Amendment right to send and receive mail. *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curium). Prison regulations concerning outgoing prisoner mail must further "important or substantial governmental interests unrelated to the suppression of expression," *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *limited by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989), but such regulations must at least more closely fit the interests served than regulations concerning incoming mail. *See Thornburgh*, 490 U.S. at 412; *Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008) (per curium); *Witherow*, 52 F.3d at 265.

A prison may adopt regulations which impinge on a prisoner's First Amendment rights if the regulations are "reasonably related to legitimate penological interests." *Witherow*, 52 F.3d at 265 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Legitimate penological interests include security, order and rehabilitation. *Procunier*, 416 U.S. at 412-13 ("the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence.").

Plaintiff alleges that defendants violated his First Amendment right to correspond by withholding his address book so that plaintiff was unable to communicate with family and friends (#5, p. 7). Defendants contend that plaintiff was never denied access to the information in his

1 address book, and that he was always permitted to access the address book upon request (#35, p. 12).
2 This contention is belied by the record.

3 Plaintiff has submitted a series of grievances which indicate that he did not have access to his
4 address book from October 28, 2010 until June 20, 2012, although he filed multiple prison
5 grievances requesting the book as early as July 2011 (#27, Ex. H, pp. 107-114; *see* defendant
6 Baker's response to Grievance Log No. 2006-29-941130 ("You were given access to your address
7 book on 6/20/12. It will be maintained outside of your cell and you can request to review it as
8 needed via CERT."). After June 20, 2012, it appears that plaintiff's address book was kept outside
9 his cell, and he was permitted to access the book upon request (#35-11, Ex. K, ¶¶ 11-12; #35-12, Ex.
10 L, p. 8). A member of CERT would deliver the address book to plaintiff's cell and would then
11 retrieve it when plaintiff was finished using it (#35-11, Ex. K, ¶ 12).

12 Defendants acknowledge that plaintiff is entitled to basic First Amendment rights, including
13 the right to access the information within his address book so that he may correspond with family
14 and friends (#35, p. 12). It is unknown why defendants did not permit plaintiff to access this
15 information until June 20, 2012. By that time, plaintiff had been housed in ESP's infirmary isolation
16 cell for over nineteen months. Defendants had worked out a system to provide plaintiff with certain
17 personal hygiene items and to provide plaintiff with shoes whenever he travelled outside his
18 isolation cell (#35-11, Ex. K. ¶¶ 13, 15). Thus, the motivation behind defendants' decision to
19 withhold the information within plaintiff's address book until June 20, 2012, is a genuine issue of
20 material fact for trial. Defendants have not provided the court with any information as to the
21 penological interests justifying such a course of action. Accordingly, the court recommends that
22 defendants' cross-motion for summary judgment be denied as to plaintiff's First Amendment right to
23 correspond claim.
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1 **5. Qualified Immunity**

2 Where a plaintiff has stated a valid cause of action under 42 U.S.C. § 1983, government
 3 officials sued in their individual capacities may raise the affirmative defense of qualified immunity.
 4
 5 See *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005). “Qualified immunity balances two
 6 important interests—the need to hold public officials accountable when they exercise power
 7 irresponsibly and the need to shield officials from harassment, distraction, and liability when they
 8 perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This immunity is
 9 granted broadly and “provides ample protection to all but the plainly incompetent or those who
 10 knowingly violate the law.” *Moran v. Washington*, 147 F.3d 839, 844 (9th Cir. 1998) (quoting
 11 *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

13 “The doctrine of qualified immunity protects government officials from liability for civil
 14 damages insofar as their conduct does not violate clearly established statutory or constitutional
 15 rights of which a reasonable person would have known.” *Clouthier v. County of Contra Costa*,
 16 591 F.3d 1232, 1240 (9th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “In
 17 considering a claim of qualified immunity, the court must determine ‘whether the facts that a
 18 plaintiff has alleged … make out a violation of a constitutional right,’ and ‘whether the right at issue
 19 was clearly established at the time of defendant’s alleged misconduct.’” *Id.* (quoting *Pearson*, 555
 20 U.S. at 232. Whether a right is clearly established turns on the “objective legal reasonableness of the
 21 action, assessed in light of the legal rules that were clearly established at the time it was taken.” *Id.*
 22

24 “[A] district court should decide the issue of qualified immunity as a matter of law when ‘the
 25 material, historical facts are not in dispute, and the only disputes involve what inferences properly
 26 may be drawn from those historical facts.’” *Conner v. Heiman*, 672 F.3d 1126, 1131 (9th Cir. 2012)
 27 (quoting *Peng v. Mei Chin Penghu*, 335 F.3d 970, 979-80 (9th Cir. 2003)). “Only where ‘historical
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1 facts material to the qualified immunity determination are in dispute' should the district court submit
 2 the issue to a jury." *Conner*, 672 F.3d at 1131 (quoting *Torres v. City of Los Angeles*, 548 F.3d
 3 1197, 1211 (9th Cir. 2008)).
 4

5 Defendants generally argue that because plaintiff presents a unique escape risk, defendants
 6 are entitled to qualified immunity for any acts that may have run afoul of plaintiff's constitutional
 7 rights (#35, p. 13). The court disagrees.
 8

Confiscation of Plaintiff's Personal Property

9 It is clearly established that plaintiff possesses a Fourteenth Amendment due process right to
 10 a pre-deprivation hearing before an authorized property deprivation. *Haygood*, 769 F.2d at 1357
 11 (citation omitted). It is also clearly established that an authorized property deprivation is permissible
 12 if it is reasonably related to a legitimate penological interest. *Turner*, 482 U.S. at 89. Here,
 13 however, the record is silent as to NDOC's regulations governing property confiscation, Ely's
 14 penological interests in confiscating *all* of plaintiff's personal property, and any sort of procedural
 15 due process that plaintiff may or may not have been afforded. When analyzing a claim of qualified
 16 immunity, the court must view the facts in the light most favorable to the plaintiff. *Saucier*, 533
 17 U.S. at 201. When doing so here, defendants confiscated all of plaintiff's personal property with no
 18 notice or pre-deprivation process. Thus, the propriety of defendants' actions is dependent upon the
 19 resolution of multiple issues of material fact. As this is a case where "historical facts material to the
 20 qualified immunity determination" are in dispute, *Torres*, 548 F.3d at 1211, the court finds that
 21 qualified immunity would be inappropriate on this claim.
 22

Right to Correspond

23 It is clearly established that plaintiff possesses a First Amendment right to correspond with
 24 others by sending and receiving mail. *Witherow*, 52 F.3d at 265; *Procunier*, 416 U.S. at 408. There
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1 is also no doubt that defendants' refusal to provide plaintiff with the information contained within
2 his address book effectively prohibited him from exercising his right to correspond with family and
3 friends. Defendants do not argue that plaintiff had no constitutional right to the information
4 contained within his address book, or that defendants had a legitimate penological interest in
5 withholding this information from October 28, 2010 until June 20, 2012. Instead, defendants argue
6 that plaintiff was never denied access to the information in his address book (#35, p. 12). As noted
7 previously, this contention is unsupported by the record (#27, Ex. H, pp. 107-114).

8 Although the court acknowledges that "the informed judgment of prison officials is to be
9 afforded deference," *Farmer v. Brennan*, 511 U.S. 825, 832-33 (1994), the court also recognizes that
10 there are limits to how long a state may suspend an inmate's First Amendment rights. In this case,
11 when viewing the facts in the light most favorable to plaintiff, defendants withheld the information
12 in plaintiff's address book for over nineteen months, effectively preventing plaintiff from exercising
13 his right to correspond with family and friends.

14 The court finds that the propriety of defendants' delay in providing plaintiff with the
15 requested information from his address book is dependent upon resolution of the factual disputes in
16 this case. Although defendants argue that plaintiff's ability to manufacture escape tools out of
17 regular prison items necessitated the withholding of his property (#35, p. 13), they do not explain
18 why it was necessary to withhold the *information* contained within plaintiff's address book. In an
19 effort to meet plaintiff's constitutional requirements, defendants "craft[ed] the unique solution of
20 securing [plaintiff's property] outside his cell and having correctional officers deliver it to him as he
21 needed it" (#35, p. 14). However, defendants do not explain why it took them nineteen months to do
22 this with regard to plaintiff's address book.
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Without further information, the court cannot find that a reasonable prison official would believe that depriving an inmate of his ability to correspond with family and friends for over nineteen months was constitutionally permissible. As this is a case where “historical facts material to the qualified immunity determination are in dispute,” qualified immunity is inappropriate at this juncture. *See Torres*, 548 F.3d at 1211; *Wilkins v. City of Oakland*, 350 F.3d 949, 955-56 (9th Cir. 2003) (whether officers made a reasonable mistake of fact or law may depend on the jury’s resolution of disputed facts); *Lolli v. County of Orange*, 351 F.3d 410, 421-22 (9th Cir. 2003).

A jury could find that defendants’ approximately nineteen-month delay in providing plaintiff with the information in his address book was unreasonable, and therefore, constitutionally infirm. Under such circumstances, defendants’ actions are not protected by qualified immunity. Accordingly, the court recommends that defendants’ cross-motion for summary judgment be denied as to the defense of qualified immunity.

III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that defendants are entitled to summary judgment in their favor as to plaintiff’s Eighth Amendment claims and Fourteenth Amendment due process claim related to his confinement in ESP’s infirmary. However, defendants are not entitled to summary judgment in their favor as to plaintiff’s Fourteenth Amendment due process claim related to the confiscation of his property or his First Amendment claim. Therefore, the court recommends that defendants’ cross-motion for summary judgment (#35) be **GRANTED** in part and **DENIED** in part. The court also recommends that plaintiff’s motion for summary judgment (#27) be **DENIED** in its entirety. The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and LR Rule IB 3-2, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt.

1 These objections should be entitled “Objections to Magistrate Judge’s Report and Recommendation”
2 and should be accompanied by points and authorities for consideration by the District Court.
3

4 2. This Report and Recommendation is not an appealable order and any notice of appeal
5 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court’s judgment.
6

IV. RECOMMENDATION

7 **IT IS THEREFORE RECOMMENDED** that plaintiff’s motion for summary judgment
8 (#27) be **DENIED** in its entirety. **IT IS ALSO RECOMMENDED** that defendants’ cross-motion
9 for summary judgment (#35) be **GRANTED** in part and **DENIED** in part, as follows:
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11 **IT IS RECOMMENDED** that defendants’ cross-motion for summary judgment be
12 **GRANTED** as to plaintiff’s Eighth Amendment conditions of confinement claim.
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14 **IT IS FURTHER RECOMMENDED** that defendants’ cross-motion for summary judgment
15 be **GRANTED** as to plaintiff’s Eighth Amendment deliberate indifference to medical needs claim.
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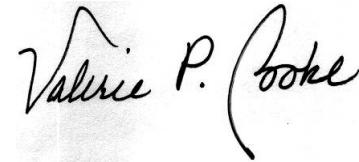
17 **IT IS FURTHER RECOMMENDED** that defendants’ cross-motion for summary judgment
18 be **GRANTED** as to plaintiff’s Fourteenth Amendment due process claim related to his housing in
19 ESP’s infirmary.
20

21 **IT IS FURTHER RECOMMENDED** that defendants’ cross-motion for summary judgment
22 be **DENIED** as to plaintiff’s Fourteenth Amendment due process claim related to the confiscation of
23 his personal property.
24

25 **IT IS FURTHER RECOMMENDED** that defendants’ cross-motion for summary judgment
26 be **DENIED** as to plaintiff’s First Amendment right to correspond claim.
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1 **IT IS FURTHER RECOMMENDED** that defendants' cross-motion for summary judgment
2 be **DENIED** as to plaintiff's affirmative defense of qualified immunity.
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4 **DATED:** August 23, 2013.
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6 **UNITED STATES MAGISTRATE JUDGE**
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